(36)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No.763 of 2001

Kumar Singh

- Versus -

State of Chhattisgarh

Criminal Appeal No.784 of 2001

Nande Singh

- Versus -

State of Chhattisgarh,

AND

Criminal Appeal No.874 of 2001

Amritlal & another

- Versus -

State of Chhattisgarh

JUDGMENT FOR CONSIDERATION

Sd/-
L.C.BHADOO
Judge

I agree.

HON'BLE MR. JUSTICE SUNIL KUMAR SINHA

Sd/-
Sunil Kumar Sinha
Judge

POST FOR PRONOUNCEMENT OF JUDGMENT ON 11 MAY, 2007

Sd/-
JUDGE
10-5-2007

(37)

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.763 of 2001

APPELLANT:
(In jail)

Kumar Singh, son of Bajrang Singh Thakur, aged about 34 years, resident of village Bhaismundi, P.S. Janjgir, Dist. Janjgir (Chhattisgarh)

- Versus -

RESPONDENT:

State of Chhattisgarh, Through: P.S. Janjgir, Distt. Janjgir (Chhattisgarh)

Criminal Appeal No.784 of 2001

APPELLANT:
(In jail since 17.11.95)

Nande Singh, S/o Rameshwar Singh, aged about 30 years, resident of Village Bais-mundi, P.S. Janjgeer, District Janjgeer Chhattisgarh Rajya

- Versus -

RESPONDENT:

State of Chhattisgarh, Through: District Magistrate, Janjgeer, District Janjgeer, Chhattisgarh Rajya.

AND

Criminal Appeal No.874 of 2001

APPELLANTS:
(In jail)

1. Amritlal, S/o Konda Sahu, Aged 40 years,
2. Dhananjay, S/o Baijnath Kashyap aged 40 years,

Both residents of Village: Bhaisbod P.S. Janjgir, District Janjgir, Chhattisgarh.

- Versus -

RESPONDENT:

State of Chhattisgarh,

(Appeals under Section 374 (2) of the Cr.P.C.)

Present:

Mr. Prafulla N. Bharat, counsel for the appellant in Cr.A.No.784/2001

Mr. Somnath Verma, counsel for the appellant in Cr.A.No.763/2001.

Mr. S.L. Bajaj, counsel for the appellants in Cr.A.No.874/2001.

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Mr. G.K. Beriwal, Deputy Advocate General with Mr. U.N.S. Deo & Mr. D.K. Gwalre, Additional Public Prosecutors for the State/respondent.

Division Bench: **Hon'ble Mr. L.C. Bhadoo and**
Hon'ble Mr. Sunil Kumar Sinha, JJ.

JUDGMENT

(Delivered on 11th May, 2007)

The following judgment of the Court was delivered by ***L.C. Bhadoo, J.***

1. The aforesaid appeals filed by Kumar Singh, Nande Singh, and Amritlal & Dhananjay, respectively, are being disposed of by this common judgment as all these appeals are arising out of the same judgment dated 12-7-2001 passed by the additional Sessions Judge, Janjgir, in S.T. No.341/95.

2. By these appeals under Section 374 (2) of the Cr.P.C., the accused/appellants have questioned legality and correctness of the judgment of conviction and order of sentence dated 12th July, 2001 passed by the Additional Sessions Judge, Janjgir in S.T.No.341/95, whereby learned Additional Sessions Judge after convicting each of the accused/appellants for commission of offence under Section 302 read with Section 149 of the I.P.C., sentenced each of the accused to undergo imprisonment for whole life and to pay a fine of Rs.200/-. Learned Additional Sessions Judge also convicted the accused/appellants under Section 148 of the I.P.C., but did not pass any separate sentence for that offence.

3. In all 36 accused persons were tried for committing offence under Sections 302 read with Section 149 and 148 of the I.P.C. for committing murder of one Kalicharan in S.T. No.341/95. After conclusion of the trial, 4 accused persons have been convicted and sentenced as aforementioned, however, other 32 accused persons have been acquitted.

4. Case of the prosecution, in brief, is that there were two groups in Village: Bhaismudi, one group was consisting of deceased Jawahar Singh, Bhupendra Singh & others, whereas the other group was of the accused persons who faced sessions trial No.341/95. There was dispute between two groups on account of Panchayat elections and other reasons. In the intervening night of 16th & 17th January, 1995, a meeting was convened at the house of accused Kumar Singh, object of that meeting was to take decision to commit murders of Viki Singh, Jawahar Singh, Bhupendra Singh, Shailendra Singh and Kalicharan. All those accused persons formed an unlawful assembly with the

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above objective, in furtherance of their common objective on 17-1-1995 the accused party committed murder of Viki Singh near Nawa Talab, thereafter, they committed murders of Jawahar Singh and his two sons namely, Bhupendra Singh & Shailendra Singh in their agricultural field where they were working, thereafter they went to Holha Chowk of Bhaismudi and committed the murder of Kalicharan by attacking him with Lathis & Tabbals. In this case, 36 persons were charge-sheeted who faced S.T. No.341/95, out of those, present accused/applicants have been convicted who have preferred these appeals.

5. PW-1 Lagan Bai gave information Ex.-P/1 to Police Station Janjgir in Village Bhaismudi to the effect that on 17-1-95 at about 12.40 hours her son Kalicharan left the house to bring cattle. About 15-20 minutes thereafter, she heard commotion, therefore, she came in Holha Chowk and saw that Nande Singh, Jaipal Kurmi, Resham Kurmi, Guha Kurmi, Baran Kurmi, Basant Das, Amrit Sahu, Nirmal Kashyap,Santosh Singh, Meghnath Sahu, Melabai, Raj Kumar Singh, Prahlad Singh, Rameshwar Singh, Lala @ Nand Kumar, all residents of village Bhaismudi, out of them, Amrit Sahu and Nirmal Kashyap were carrying Tabbal in their hands, remaining persons were carrying lathi in their hands. All these persons were attacking Kalicharan. He was lying on the ground. After attacking they went towards Bhalbhadra pond. She went near Kalicharan who was lying on the ground, blood was oozing out of his head. He was already dead. The persons nearby the place of the incident might have seen the incident. In the Panchayat Elections Kalicharan supported Jawahar Singh, therefore, Amrit & others were angry with Kalicharan and that is why they have committed murder of Kalicharan. Dehati merg intimation Ex.-P/2 was also given by Lagan Bai, based on which FIR Ex.-P/60 was registered. Merg intimation Ex.-P/61 was given by PW-14 A.K. Mitra, sub inspector.

6. The Investigating Officer after giving notice Ex.-P/43 to the Panchas, prepared inquest Ex.-P/44 on the body of Kalicharan. Site plan Ex.-P/46 of the place of occurrence was prepared by the Revenue Inspector. The dead body of Klaicharan was sent for postmortem examination to the Primary Health Centre, Janjgir under Ex.-P/56 where Dr. H.R. Tharwani conducted postmortem on the body of Kalicharan. He opined that cause of death was shock due to external and internal haemorrhage, as a result of injuries on head.

7. After completion of investigation, charge sheet was filed in the Court of Judicial Magistrate, 1st Class, Janjgir, who in turn committed the case to the Sessions Judge, Bilaspur from where learned Additional Sessions Judge received the case on transfer for trial.

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8. The prosecution in order to establish the charge examined 15 witnesses at the trial. Statements of the accused persons were recorded under Section 313 Cr.P.C. in which all the accused persons denied material appearing against them in the prosecution evidence.

9. Learned Additional Sessions Judge after hearing counsel for the respective parties convicted and sentenced the present accused/appellants as aforesaid whereas, acquitted other 32 accused persons.

10. We have heard learned counsel for the parties.

11. Learned counsel for the accused/appellants have not disputed homicidal death of Kalicharan. Moreover, Dr. H.R. Tharwani (PW-12) has stated that on 18-1-95 he conducted postmortem on the body of Kalicharan. He noticed 3 lacerated wounds on various parts of the head. There was fracture of right parietal bone. There was laceration on the brain material. Clotted blood was present. There was fracture of right occipito parietal bone. The fracture was of frontal right side bone. There was laceration in the brain material and duramata. All the injuries were ante mortem in nature. The cause of death was internal and external haemorrhage. Injuries were sufficient in the ordinary course of nature to cause death. Death of Kalicharan was homicidal in nature. Therefore, in view of the above medical evidence, it is established that death of Kalicharan was homicidal in nature.

12. As far as involvement of the accused/appellants in crime in question is concerned, learned counsel for the accused/appellants while drawing the attention of the Court towards evidence of PW-1 Lagan Bai and PW-3 Dadu Prasad, argued that in fact, these witnesses had not witnessed the crime. There is improvement in the Court evidence. Therefore, the prosecution has failed to establish involvement of the accused/appellants in the crime in question.

13. On the other hand, learned counsel for the State/respondent supported the judgment of the trial Court.

14. In order to appreciate argument advanced by learned counsel for the respective parties, we have perused evidence, record and judgment of the trial Court. PW-1 Lagan Bai, mother of the deceased, has stated that her son Kalicharan left the house to bring cow. After some time, when she heard sound that cow has come, therefore, she came out of the house to catch cow, at that time, she reached Holha Chowk and saw that accused Nande, Jaipal,

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Kumar, Amrit, Dhananjay, Raj Kumar, Melabai, Kumar Singh, Rameshwar Singh, Nandkumar, Santosh, Meghnath, Balchand, Devilal, Nirmal and Basant were running after her son Kalicharan, among them Basant was carrying rod, Amrit was carrying Farsa, Nande was carrying lathi and other persons were carrying lathi. All of them encircled Kalicharan and attacked him. She was witnessing the incident standing behind the wall. Thereafter, the accused persons left towards Bhalbhadra pond.

15. PW-3 Dadu Prasad has stated that on 17th January 1995 in between 10.30 to 11.30 a.m. he was present in Holha Chowk near the shop. Along with him Firat Sahu, Krishna Kumar Sahu, Pushpendra Dubey and Ramesh Sharma were also present. From the vicinity side, Kalicharan was coming crying saying 'Save Save'. 4-5 persons were after him. Amrit Sahu, Nande Singh, Kumar Singh, Dhananjay Kashyap, Guha Kashyap, Janak Yadav, Baran Kashyap were the persons who were chasing Kalicharan. Kumar Singh was carrying rod. Dhananjay was carrying Farsa. Remaining persons were carrying lathis. When they started attacking Kalicharan in Holha Chowk, he became frightened. They entered the shop of Firat. Half an hour thereafter he went to his house. In para-3, he has stated that Kumar Singh, Nande Singh and Amrit all the three attacked. Nande Singh attacked with rod. Remaining persons attacked with lathi. Amrit and Nande had attacked with lathi. When he was going to the residence, mother of Kalicharan enquired that where is Kalicharan? On which he said that he is in Holha Chowk, thereafter he left to his house. In cross-examination, he has stated that it is incorrect that Amrit Sahu was carrying Farsa. In his statement Ex.-P/45 he had not said that Amrit was carrying Farsa. He had not disclosed to the police that Jaipal, Ram Kumar Choubey, Rohit Kashyap, Resham, Basant, Rohti Karsh, Anandram were chasing Kalicharan. There was hole in the door of the shop through which he was peeping out and watching the incident. It is correct to say that after attacking Kalicharan the accused persons left, thereafter he came out of the door. While giving statement Ex.-P/45, he disclosed to the I.O. that Dhananjay was carrying Farsa. Why police people have not written he does not know. He also disclosed that Nande Singh attacked with lathi. He did not disclose that he attacked with rod. He has further stated that Kumar Singh had attacked with rod. If it has been written in para-3 of examination-in-chief that Nande attacked with rod, he does not know. In para-20 of cross-examination, he has stated that when Kalicharan was being beaten, all the persons had not entered the shop, thereafter he himself has stated that Firat, Krishna kumar, Pushpendra and Ramesh entered the shop. He did not enter the shop. He

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entered the shop when beating started. It is not correct that he entered the shop before beating commenced. It is correct that his friends entered the shop before beating started. After closing the door, chain was closed. A wood of door was broken, therefore, hole was at the broken place.

16. Perusal of the above evidence of these witnesses shows that they are contradictory to each other. Lagan Bai (PW-1) in her report Ex.-P/1 has stated that at about 12.40 hours Kalicharan left to bring cattle. 15-20 minutes thereafter, she heard commotion. She saw that Nande Singh and other were attacking Kalicharan. Amrit Sahu and Nirmal Kashyap attacked with Tabbal. Remaining accused persons attacked with lathi, whereas, in her Court evidence, she has stated that her son Kalicharan went to bring cow, thereafter hearing sound of cow, she went to catch cow, she reached on the Holha chowk where the accused persons were chasing her son Kalicharan. Amrit was carrying Farsa. Basant was carrying rod whereas, in para-10 of her evidence she has stated that she was not able to disclose the name of anyone when she gave report to the police. She said that Shiv Sena people were there. As she was not conscious, that is why she had not disclosed the name. She signed the papers after regaining consciousness. Her statement was recorded by the I.O. after 2-4 days when she became conscious. After 4 days of the incident, I.O. had recorded her statement. In para-13 of her evidence, she has stated that while giving report Ex.-P/1 and statement Ex.-D/1 she disclosed to the police that first Nande attacked, thereafter Basant and thereafter Amrit attacked. Thereafter, all the persons started attacking. If that is not written in the statement and report, then she does not know. She was watching the incident from the house of one Verma who was not at his residence. In para-23, she has stated that Raut used to shout from Naya Talab that cow is going, therefore, they used to bring cow. It is correct that in between Naya Talab and Holha Chowk there are 500 houses, therefore, when cow was to be brought from Naya Talab, how she went to Holha chowk which was after 500 house. She has also stated that when she gave report Ex.-P/1 and statement Ex.-D/1, she disclosed that on hearing shout of Raut she went to Holha chowk. If that is not written in these documents, then she cannot assign any reason. While giving report Ex.-P/1 and statement Ex.-D/1, she did not disclose that she was watching incident standing behind the wall. Therefore, there is improvement in the Court evidence. There are material omissions in the report Ex.-P/1 and her police case diary statement Ex.-D/1. In her Court evidence, she has stated that Nande, Jaipal, Kumar, Amrit, Dhananjay, Rajkumar, Melabai, Kumarsingh, Rameshwar Singh, Nandkumar, Santosh, Meghnath, Balchand, Devilal, Nirmal

and Basant were chasing. Amrit attacked with Farsa, Nande attacked with lathi whereas, Dr. H.R. Tharwani (PW-12), who conducted postmortem, has stated that there were 3 lacerated wounds on various parts of the head. There was no injury of Farsa i.e. incised wound on the body of the deceased, whereas, this witness has stated that Amrit attacked with Farsa. She has also stated that all the accused persons attacked with lathi, whereas, only 3 injuries were found on the body of the deceased. Had so many persons, who were more than 30 in number, attacked Kalicharan with lathi, then there would have been more injuries on the body of the deceased.

17. PW-3 Dadu Prasad has stated that Nande attacked with rod whereas, PW-1 has stated that Nande attacked with lathi. He has further stated that other persons attacked with lathi. Amrit and Nande were attacking with lathi, whereas, Lagan Bai (PW-1) has stated that Amrit attacked with Farsa. PW-3 has also stated that Dhananjay attacked the deceased with Farsa. But no such injury was found on the body of Kalicharan. In para-3, he has stated that when he was going to his residence, mother of Kalicharan enquired about Kalicharan, then he said that he is in Holha chowk. If evidence of this witness is believed, then he saw the incident. When he was going to his residence, mother of Kalicharan enquired from him, then he disclosed to her that he is in Holha Chowk. If that evidence is believed, then Lagan Bai had not witnessed the incident. Her evidence is that she went towards Holha chowk to catch cow, there she saw that the accused persons were chasing Kalicharan and they attacked, whereas, this witness has stated that mother of Kalicharan enquired from him that where Kalicharan was. Moreover, PW-3 Dadu Prasad, in the first instance, has stated that when he saw the accused persons attacking the deceased, being frightened, he entered the shop of Firat, half an hour thereafter he had left for his house. Therefore, there was no occasion for this witness, when he entered the shop, to see attack being made by the accused persons. In para-7, he has stated that he was watching the incident through hole of the door of shop of Firat Sahu. In para-20, he has stated that it is incorrect to say that all the persons entered the shop of Firat. Firat, Krishna kumar, Pushpendra and Ramesh entered the shop. He did not enter the shop. He entered only after beating started, whereas, in para-2, he has stated that he entered the shop of Firat and watched the incident through hole. Evidence of these two witnesses are contradictory to each other. There are number of improvements in their evidence, which they have not stated in the police case diary statement. Even they have stated that Amrit and Dhananjay were carrying Farsa and lathi whereas, there was no incised wound found on the

body of the deceased. There are only 3 lacerated wounds. If persons, who were more than 30 in number, had attacked with lathi and Farsa, then it was not possible to cause only 3 injuries, it would have been more number of injuries. PW-3 has stated that when he was standing near the shop at Holha chowk, Firat Sahu, Krishna Kumar, Pushpendra Dubey and Ramesh Sharma were also present, but these independent witnesses have not been examined.

18. For the above infirmities in the evidence of these two witnesses, particularly, when they are closely related to the deceased, evidence of these two witnesses does not inspire confidence of the Court that in fact, they had witnessed the crime in question. No explicit reliance can be placed on their evidence. Therefore, the prosecution has failed to establish that the accused/ appellants had, in fact, attacked the deceased.

19. The accused/appellants have been convicted with the aid of Section 149 I.P.C. As out of 36 accused persons, only 4 accused persons have been convicted. All other named accused persons have been acquitted by the trial Court, therefore, these four persons cannot be convicted with the aid of Section 149 of the IPC. The law on the point is that if less than 5 persons named and some other unknown persons said to have been involved in the crime, then persons whose number is less than 5 can be convicted with the aid of Section 149, but where number of persons is more than 5 and all named accused persons are there, then if out of those persons some accused persons are acquitted that they were not member of unlawful assembly or member of the assailant party, thereafter if remaining persons are less than 5, then such persons cannot be convicted with the aid of Section 149 of the IPC. We are fortified in our view by the judgment of the Apex Court in the matter of **Nethala Pothuraju and others V. State of Andhra Pradesh** reported in **AIR 1991 SC 2214** wherein the Hon'ble Apex Court held that:-

> "The appellants being only three in number, there was no question of their forming an unlawful assembly within the meaning of Section 141, I.P.C. It is not the prosecution case that apart from the seven accused persons there were some other unidentified persons who were involved in the crime. The High Court clearly fell into error in confirming the conviction and sentence of the appellants under Section 148 and on applying S.149, I.P.C. on the ground that they formed an unlawful assembly along with some unidentified

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persons. The prosecution case from the very beginning was that A1 to A7, the named persons, formed the unlawful assembly. A-4 to A-7 having been acquitted, the remaining three appellants cannot be convicted under Section 148 and on applying S.149 I.P.C."

20. In the matter of **Amar Singh V. State of Punjab** reported in **AIR 1987 SC 826** the Hon'ble Apex Court held that:-

"Seven accused were charged for murder under Section 302 read with Section 149, I.P.C. Two out of the seven accused were acquitted by the trial Court and on appeal the High Court acquitted one more accused. However, the High Court convicted four of the accused under Section 302 read with Section 149, I.P.C. and sentenced them for life imprisonment. The four convicted accused appealed to this Court and it was contended on their behalf that after the acquittal of three accused persons out of seven, the appellants who were remaining four cannot be held to have formed an unlawful assembly within the meaning of Section 141, I.P.C. and accordingly the charge under Section 149 was not maintainable. The Apex Court held that 'As the appellants were only four in number, there was no question of their forming an unlawful assembly within the meaning of Section 141, I.P.C. it is not the prosecution case that apart from the said seven accused persons, there were other persons who were involved in the crime. Therefore, on the acquittal of three accused persons, the remaining four accused, that is, the appellants, cannot be convicted under Section 148 or Section 149, I.P.C. for any offence, for, the first condition to be fulfilled in designating an assembly an 'unlawful assembly' is that such assembly must be of five or more persons, as required under Section 141, I.P.C."

21. Similarly, in this case also, the prosecution filed charge sheet against 36 accused persons for committing murder of Kalicharan, in furtherance of the

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common object of unlawful assembly constituting 36 accused persons, 32 accused persons have been acquitted by the trial Court, therefore, only 4 accused persons are left out. There is no prosecution case that apart from 36 accused persons otherswere also involved in the incident. Charge against the accused persons is only under Sections 302/149 and 148 of the I.P.C., therefore, on the above analogy, conviction of the accused/appellants under Sections 302 read with Section 149 and 148 of the I.P.C. cannot be sustained.

22. For the foregoing reasons, conviction and sentence imposed upon the accused/appellants under Sections 302 read with Section 149 and 148 of the I.P.C. cannot be sustained.

23. In the result, the aforesaid appeals are allowed. Conviction and sentence imposed upon the accused/appellants under Sections 302 read with Section 149 and 148 of the I.P.C. are set aside. They are acquitted of the said charges. They be released forthwith, if not required in any other case.

Sd/-
L.C.BHADOO
Judge

Sd/-
Sunil Kumar Sinha
Judge

Barve